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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 782

HENRY C. GLADSTEIN,

Appellant,

vs.

THE CITY OF OMAHA, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

STATEMENT AS TO JURISDICTION

M. L. Wilson,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 792

HENRY C. GLISSMANN,

Appellant,

vs.

THE CITY OF OMAHA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

The principal question involved in this appeal is whether or not a municipal corporation under the authority granted them by the state, can under the guise of an amendment to a zoning ordinance absolutely deprive the defendant, appellant herein, of all use of his property, when the use for which he leased the property was permissible under the original ordinance, and prohibited under the amendment, and he had incurred considerable expense, and incurred a $25,000.00 obligation for a twenty (20) years' lease of the property before the ordinance was amended,

was granted a permit to go ahead with the improvement, his plans were approved by the City Commissioners of the City, and the State Sanitary authorities, and then on account of protest of owners the ordinance was amended to prohibit the improvement, because it might affect the value of their property, although when they bought their property, the business sought to be established was permitted under the Zoning Ordinance in effect at that time, and under the lease held by this appellant, and that the amendment prohibited the installation of a trailer camp at this locality. That the permit issued by the City to install a trailer camp was never revoked.

That the amendment of the Ordinance was granted solely at the behest of abutting property owners. That said amendment bore no relation to the police power, public morals or public safety, and the amendment deprived defendant of all use of his leasehold interest in the property involved in violation of the 14th Amendment to the Constitution of the United States, which prohibits a state from depriving a person of his property without due process of law, or denies to him the equal protection of the law.

This petitioner claims that the question involved here is substantial, as the opinion shows that the Court was divided on this question as to the constitutionality of this ordinance by a decision of four (4) to three (3).

That this constitutional question was raised in the pleadings filed in the District Court of Douglas County, Nebraska, which was the court of first instance, and was also raised in the appellate court of the state, and was affirmatively passed upon by the state court as shown by their opinion that upheld the validity of the State Statute authorizing zoning, against the objection that it was in violation of the United States constitutional provisions above set forth.

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That the opinion in this case is now officially reported
n 151 Neb. 895, 39 N. W. (2d) 828, and clearly shows
age 834 of the N. W. under subdivision 7, that appellant
as raised the question, that the amended ordinance passed
n December 30, 1947 is arbitrary, unreasonable and bears
o relation to the proper exercise of the city's police power,
nd deprives him of his property without just compensa-
ion, and in violation of the provisions relating thereto of
oth State and Federal Constitutions, and the State Court
pheld its validity as against said objection.

S. L. WINTERS,
Counsel for Appellant.

APPENDIX

On consideration of the pleadings, evidence and briefs filed by counsel in the above entitled cause, I am finding generally in favor of plaintiff and granting the relief prayed for in its petition. Journal entry should be prepared and submitted for my approval and signature in accordance herewith.

The area west of Omaha between 84th and 90th, and Pacific and Dodge Road was zoned by the City Council March 1, 1945 as "Second Suburban". The operation of a trailer camp was permissible in such a zone provided a permit had been obtained from City and compliance had been made with the regulations prescribed by City Ordinance.

On December 30, 1947 the area was zoned as "First Residence," by City Ordinance #15833 effective 15 days after its passage. In such a zone the establishment and maintenance of trailer camps was not permitted.

The constitutionality of Ordinance #15833 has been drawn in question. I am satisfied this ordinance meets the tests of constitutionality, and is not an arbitrary invasion of individual rights under the guise of police regulation as argued.

But does it apply to defendant, or may he operate his trailer camp despite the ordinance for the reason that he acquired "vested rights," before the ordinance was passed?

If defendant had established his trailer camp after having relied upon and complied with the then existing zoning ordinances and regulations and requirements of the City, and in the establishment of the camp in good faith had invested or devoted any substantial sum of money or time on the property the situation would be somewhat different than that developed by the evidence in this case.

Defendant had been occupying much of the area under a lease from Gwyer Yates executed in 1939 and running to 1963 which was subject to cancellation by lessor under certain conditions. The land was, and still is, used as "Indian Hills Golf Course." Prior to November 8, 1947 defendant carried on negotiations with the lessor for the making of a new lease. Defendant was concerned about the cancella-

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tion clause in the old lease. The new lease, which also covered some additional territory including the site of the trailer camp, was executed November 8, 1947 effective January 1, 1948. To the time of its execution lessor had not been advised that defendant planned to establish a trailer camp on the additional site. But before November 8th, defendant had purchased a few buildings from the War Department to be used in the trailer camp.

On November 12th defendant made written application to the City for a permit to establish a trailer camp. On November 18th the Council voted in favor of granting it subject to the rules and regulations of the City governing trailer camps. Defendant was instructed to see the engineer of the building department. Posting of a bond and obtaining the approval of the City with reference to sanitation and other matters yet had to be done. But before these matters were disposed of an objection to the establishment of a trailer camp was filed with the City on November 25th by property owners living in the vicinity of the proposed camp. The Council voted in favor of referring the matter to the City Legal Department, and to set the matter for hearing December 9th. On November 26th the City Clerk advised the defendant by telephone of the action taken by the Council, which advice was confirmed by letter dated December 6th. On December 8th the City Planning Commission by letter to the City Commission recommended the rezoning of the area from "Second Suburban" to "first residence."

The matter came up for hearing on December 9th before the Council. Defendant was present. The Council took favorable action on the proposal of the City Planning Commission and the matter was set for hearing December 30th, when the new ordinance was finally passed.

The evidence shows that defendant was fully advised of the various developments from the time he filed his application for a permit to operate a trailer camp until the passage of the ordinance on December 30, 1948. The evidence shows that his requested permit had not been finally issued as he had not fully satisfied the City on the various matters, such as sanitation and bond, which had to be dis-

posed of first. True, a bond signed by the surety December 12, 1947, but not signed by the principal, was tendered to the City, but by that time defendant had been definitely advised by the City that the matter of rezoning the area was being formally considered by it.

Therefore, defendant was not misled to his disadvantage by the action of the City Council on November 18th. And the evidence fails to show that defendant invested any substantial sum, or did any appreciable amount of work on the proposed camp before he was advised by the City on November 26th and December 6th, that the entire matter was being given further consideration by the Council. The evidence fails to show that defendant had acquired any rights, which had ripened into a vested right by the action of the City Council on November 18th, and, therefore, the doctrine of nonconforming use as urged by defendant is not applicable in this case.

The evidence shows that defendant urged the lessor to enter into the new lease of November 8, 1947 for the purpose of giving defendant assurance against cancellation of the lease by the lessor before its termination date. Defendant had been, and was, operating the golf course under the old lease and naturally had a heavy investment therein, and so the new lease, covering the golf course (and incidentally a few additional acres upon which defendant contemplated establishing the trailer camp) was finally executed November 8, 1947. But the right or expectation of operating a trailer camp on these additional acres was not the inducement for the execution of the new lease, even though this fact, if established, could for the purpose of argument be said to have made any difference.

1. Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances per se, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property.

2. A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a

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use to which his property was put before the enactment of the ordinance.

3. The purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto as such property is always held subject to the city's lawful exercise of the police power.

4. A new ordinance operates retroactively to require a denial of an application or to nullify a permit already issued, provided that the holder of the latter has not already engaged in construction or incurred obligations directly in relation thereto, when such application or permit seeks or grants a use no longer permitted under the new ordinance.

5. If, after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change.

6. The City of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must however not be unreasonable, discriminatory, and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance.

7. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.

8. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

9. In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within con-

stitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.

10. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

WENKE, J.:

This action was brought by the City of Omaha, a municipal corporation under home rule charter, to permanently enjoin Henry C. Glissman from proceeding with the construction, maintenance or operation of a tourist camp, trailer camp, or trailer park on lands leased by him from Gwyer H. Yates. The basis for the relief asked is that such use is contrary to and prohibited by the zoning ordinances of the city of Omaha which are applicable to the area which defendant had leased and on which he proposes to construct, maintain, and operate such tourist camp, trailer camp, or trailer park. A decree was entered by the trial court in favor of the city and two interveners. These interveners will be more fully referred to later in the opinion. From this decree, which enjoined him from using or permitting the use of the premises he had leased from Gwyer H. Yates for the construction, maintenance, or operation of a tourist camp, trailer camp, trailer park, or any similar enterprise and directing him to remove therefrom all structures, fixtures, or equipment thereon usable only for such purposes, his motion for new trial having been overruled, the defendant appealed.

After this action had been filed by the city there were two petitions of intervention filed. The first was by the West Hills Improvement Club and the second by the Ninetieth

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Street Realty Company. Both of these interveners are Nebraska corporations and by the petitions of intervention sought the same relief as had been asked for by the city in its petition. The West Hills Improvement Club is a non-profit corporation organized to promote and encourage the beneficial growth of the city of Omaha and of all territory adjacent thereto, especially that area west of the city limits. The members of this corporation all reside on or own real estate in the immediate vicinity of Ninetieth Street and Dodge Road. Ninetieth Street Realty Company is a corporation owning substantial real estate located generally southwest of the corner of Ninetieth Street and Dodge Road. This real estate is zoned as "1st Residence District" and intervener is engaged in improving, developing, and selling this real estate for residential purposes. Appellant contends that these parties had no right to intervene in this suit and that the trial court erred in holding that they were proper parties. While this question is immaterial, as the matter is properly before us on the city's petition, however, we think the ruling of the trial court was correct.

In Bangs v. Dworak, 75 Neb. 714, 106 N. W. 780, 5 L. R. A. N. S. 493, we said: "Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances per se, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property." See Holzbauer v. Ritter, 184 Wis. 35, 198 N. W. 852, and Boehner v. Williams, 213 Iowa 578, 239 N. W. 545. The allegations of the petitions of intervention and the evidence offered in support thereof bring the interveners within the foregoing principle.

The record discloses that appellant, on October 14, 1939, leased a tract of land for use as a golf course and developed thereon the Indian Hills Golf Course. The land he leased was and is owned by Gwyer H. Yates and is described as "part of the Northeast Quarter of Section 22, Township 15, North, Range 12, East of the 6th P. M. in Douglas County, Nebraska, lying south of the south line of State Highway No. 30-S," with certain described tracts excepted therefrom. These exceptions are unimportant except for two

tracts which were included in a later lease and which will hereinafter be more fully referred to. This lease, by its terms, expired on December 31, 1963, but had in it a provision whereby the lessor, at any time after the sixth year, could cancel it and recapture possession of the premises provided he had a valid sale of the entire premises or intended to subdivide the premises or a substantial part thereof. To cancel the lease the lessor was required to give the lessee a three months' notice prior to the first of any January and to pay him the sum as in the lease set forth, the amount depending upon the year in which cancellation, if made, took place. These amounts decreased substantially each year.

The whole of the lands covered by this lease were devoted to the golf course and appellant expended a very substantial sum in developing its use for that purpose. Realizing the danger of this cancellation provision which permitted cancellation and recapture on payment of a much smaller amount than the appellant had invested in the development of the golf course, the appellant, as early as November 25, 1946, sought such a modification of this lease as would eliminate this provision. This ultimately resulted in a new lease being executed on November 8, 1947. The new lease superseded the old lease as of January 1, 1948. This new lease eliminated the cancellation provision, increased the fixed rentals, and included the two tracts already referred to. The one is tax lot No. 2, known as "the wooded hilltop," and contains about 4.81 acres. It lies in the golf course and some distance south of Dodge Road. The other is a tract of about 9.1 acres lying just south of Dodge Road and along the north side of the golf course, being just west of Eighty-seventh Street and running west to within 240 feet of Ninetieth Street.

Dodge Road, as it will herein be referred to, is State Highway No. 30-S which is Dodge Street to about Eighty-fourth Street, then northwest to intersect with Cass Street at about Eighty-seventh Street, and then west on what would be Cass Street if it were extended.

The appellant testified that prior to executing the new lease on November 8, 1947, he had the intention of using

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these two tracts for a trailer camp or park; that in July and August 1947 he, with his wife and granddaughter, traveled some 6,500 miles and he expended some $600 in visiting trailer camps and parks to get information and data in regard thereto; and that in October 1947 he purchased eight small buildings at a sale held in connection with disbursing surplus war assets at the Mead Ordnance Plant to use in connection therewith. He paid $308 for these buildings. However, the evidence fully establishes the fact that he negotiated the new lease for the purpose of getting rid of the cancellation provision. The new lease is for a period of 20 years, terminating on December 31, 1967, and, with reference to such land as was not used in the golf course, provided: " • • • may be used by the Lessee as farm land or pasture, or for any other purpose which may be permissible under the provisions of the present rural zoning ordinance of the City of Omaha applicable to said tract, • • •." At the time this lease was executed the area covered by the lease was zoned as "2nd Suburban District." This zoning authorized its use for the following purposes: "Trailer camps, trailer parks and tourist camps, subject to permit and regulation prescribed by ordinances of The City of Omaha."

Appellant testified that after he executed the new lease on November 8, 1947, but before he made application to the city on November 12, 1947, for a permit to establish, maintain, and operate a trailer and cabin camp on the tract of land lying adjacent to Dodge Road, he took two men and a tractor from the golf course and used them for about a week in cutting and grubbing out some trees and grading a road in the 4.81 acre tract known as "the wooded hilltop" in contemplation of its use as a trailer camp site; and that he also used two men for a day and a half on the tract adjacent to Dodge Road for the purpose of digging a cesspool, but that they did not complete the work.

On November 12, 1947, appellant filed his written application with the council of the city of Omaha asking permission, " • • • for the right to establish, maintain, and operate a 'Trailer and Cabin Camp,' with the trailer accommodations the main object, with perhaps a few

cabins to be added. This camp is to be erected on what is part of the Indian Hills Golf Course, which faces U. S. 30 A. or Dodge St. road, from 84th St. to 90th street." A rough sketch of the proposed camp was submitted with the application showing the entrance thereto at about Eighty-seventh Street from the south side of Dodge Road. On November 18, 1947, the appellant's request for a permit was granted by the city council but made subject to the approval of the city's building department. This was done in order to make sure that the regulations for trailer camps would be complied with. This authorized permit was never actually issued because when appellant presented his bond and plans, the latter having been prepared by the Rohrbough Engineering Company, to the building inspector of the city's building department he refused to accept them as the matter was then before the city council on a petition to reconsider the matter of its authorization.

On November 25, 1947, residents of this area filed a petition with the city asking the city council to reconsider its action of November 18, 1947, authorizing the permit. The council referred this petition to the city legal department but directed the clerk to notify appellant to cease all operations under the permit which it had authorized. This the clerk did by telephone on November 26, 1947, and also by letter dated December 6, 1947. On December 3, 1947, a petition was filed with the city planning commission asking its consideration of this matter at its meeting on December 5, 1947. On December 8, 1947, the city planning commission submitted its report in regard thereto to the city council. This report included a proposed amendment to the zoning ordinances making certain areas, including the territory herein involved, into a "1st Residence District." This would eliminate its use for the purpose of trailer parks, etc. Hearing on both the petition to reconsider and the proposed amendment was held on December 9, 1947, which hearing appellant attended. The petition to reconsider was not acted upon but the proposed amendment to the zoning ordinances was favorably received and set for final hearing on December 30, 1947. Notice of this hearing was published in the World Herald.

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On December 30, 1947, the proposed ordinance, amending the zoning ordinance and making this a "1st Residence District," was passed by the city council and, by its terms, became effective 15 days thereafter.

Sometime between the first and fifteenth of January, 1948, appellant had some grading done on these premises but almost all of the work done in getting it ready for use as a trailer camp or park was done in March, April, and May, 1948, and appellant started to use it as such in May 1948.

Appellant's primary contention is that under these facts and circumstances he had established a nonconforming use of these premises as a trailer camp or park prior to the amendment by the city of its zoning ordinances relating thereto and that such right, being vested, the city could not deprive him thereof.

A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance. See Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W. 2d 600.

However, the purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto as such property is always held subject to the city's lawful exercise of the police power. See, West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S. E. 881; 16 C. J. S., Constitutional Law, s. 175, p. 541; and 11 Am. Jur., Constitutional Law, s. 264, p. 1000.

Assuming, for the purpose of this discussion, that appellant was authorized by the city council's action of November 18, 1947, to use the tract adjacent to Dodge Road for trailer park or camp purposes, although no permit was ever actually issued to him, did he take any action thereunder prior to December 30, 1947, which vested him with rights of which he could not be deprived by the city's ordinance passed on that date changing the classification of this area to "1st Residence District"?

In this respect a new ordinance operates retroactively to require a denial of an application or to nullify a permit already issued, provided that the holder of the latter has not already engaged in construction or incurred obligations directly in relation thereto, when such application or permit seeks or grants a use no longer permitted under the new ordinance. See Rice v. Van Vranken, 225 App. Div. 179, 232 N. Y. S. 506, and Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P. 2d 148.

However, after such purchase or lease, when a permit has been obtained to use the lands for a use then permissible under the zoning ordinances, a situation may arise when the city is estopped to deny the party the right to proceed thereunder. Some courts hold that, although a permit has been obtained, work commenced thereunder and contracts entered into with reference thereto, the owner thereof is not vested with any rights by reason thereof which cannot be affected by an amendment of general application in a valid exercise of the city's police power unless there has been substantial construction on the property. Other courts hold that when a permit has been obtained permitting the use of property in accordance with the then zoning regulations and the holder thereof has proceeded to act thereunder then a vested right is created which is not cut off by a subsequent amendment thereto. See, Fitzgerald v. Merard Holding Co., Inc., 110 Conn. 130, 147 A. 513, certiorari denied, 281 U. S. 732, 50 S. Ct. 240, 74 L. Ed. 1148; Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N. W. 2d 84, 138 A. L. R. 495; Pratt v. City and County of Denver, 72 Colo. 51, 209 P. 508; Crow v. Board of Adjustment of Iowa City, 227 Iowa 324, 288 N. W. 145; City of Lansing v. Dawley, 247 Mich. 394, 225 N. W. 500; Pendleton v. City of Columbia, 209 S. C. 394, 40 S. E. 2d 499; Rice v. Van Vranken, *supra;* Baker v. Somerville, 138 Neb. 466, 293 N. W. 326; and Sandenburg v. Michigamme Oil Co., 249 Mich. 372, 228 N. W. 707.

We have come to the conclusion that if, after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and

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either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change. See Trans-Oceanic Oil Corp. v. City of Santa Barbara, *supra*.

We find appellant's contention in this respect is not well taken for under the facts and circumstances of this case, as hereinbefore fully set out, the appellant had not established any vested right to use these premises for the purpose here contended when the change was made. Consequently, we find that the ordinance passed on December 30, 1948, which eliminated the use of the premises for that purpose, lawfully extinguished his permit and any rights he may have had thereunder.

Appellant also contends that the ordinance passed on December 30, 1947, is arbitrary, unreasonable, and bears no relation to the proper exercise of the city's police powers and deprives him of his property without just compensation and in violation of the provisions relating thereto of both the state and federal Constitutions.

The police power of a city is subject to the limitation that its exercise must be reasonable and for the public good. "The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals and the general welfare. Any such act of the city must however not be unreasonable, discriminatory and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance." Cassel Realty Co. v. City of Omaha, *supra*.

However, an ordinance passed in the exercise of such police power properly delegated to a city is presumably valid and the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence. See, Union Pacific R. R. Co. v. State, 88 Neb. 247, 129 N. W. 290; Faucher v. Grosse Ile Township Building Inspectors, 321 Mich. 193, 32 N. W. 2d 440; Ervin Acceptance Co. v. City

of Ann Arbor, 322 Mich. 404, 34 N. W. 2d 11; and Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P. 2d 542.

As stated in Lombardo v. City of Dallas (Tex. Civ. App.), 47 S. W. 2d 495: "The authorities are unanimous in holding that courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to the public safety, health, morals, or the general welfare."

We said in State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. N. S. 898:

"To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.

"In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

"In the exercise of policy power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised."

As stated in Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634:

"What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown it is not the province of the court to interfere. • • •

"In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions."

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Therein we cited with approval the following from Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835:

"The police power is inherent in the effective conduct and maintenance of government and is to be upheld, even though the regulation affects adversely property rights of some individual. City of Aurora v. Burns, 319 Ill. 84.

" 'If considerations of public health, safety, comfort or general welfare could have justified zoning ordinance, the court must assume that they did justify it, and cannot take issue with the city council.' State v. City of New Orleans, 154 La. 271."

In Pettis v. Alpha Alpha Chapter of Phi Beta Pi, *supra*, the court went on to say: "The weight of judicial authority clearly appears to support the proposition that, before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the council, or it must be without substantial relation to public health, safety, morals, or general welfare."

The following, taken from West Bros. Brick Co. v. City of Alexandria, *supra*, has application here, to wit: " 'Petitioner presents a strong appeal from the standpoint of financial loss occasioned by this restriction. But, as said by the North Carolina court in City of Elizabeth City v. Aydlett, 201 N. C. 602, 161 S. E. 78, 81: "Financial loss is not the test; the question is whether the scheme is sound, and the classification fair." ' (Leary v. Adams, 226 Ala. 472, 147 So. 391)."

"Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power. (Acker v. Baldwin, 18 Cal. 2d 341, 344 (115 P. 2d 455); Miller v. Board of Public Works, 195 Cal. 477, 490 (234 P. 381, 38 A. L. R. 1479); Zahn v. Board of Public Works, 195 Cal. 497 (234 P. 388);

see Otis v. City of Los Angeles, 52 Cal. App. 2d 605, 614, (126 P. 2d 954).)" Wilkins v. City of San Bernardino, *supra.*

"What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. Morgan v. City of Chicago, 370 Ill. 347; Speroni v. Board of Appeals, 368 id. 568; Michigan-Lake Building Corp. v. Hamilton, *supra;* Minkus v. Pond, 326 Ill. 467." Zadworny v. City of Chicago, 380 Ill. 470, 44 N. E. 2d 426.

The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts presented in each particular case. The evidence here shows, with reference to the tracts herein involved, that the commercial development along Dodge Road is a considerable distance to the south and east; that the immediate area to the east, southeast, and south is the golf course operated by the appellant; that to the southwest, west, northwest, and northeast are residential areas and to the north are some gardens. There appears to be no commercial development in this immediate area. In fact, the entire neighborhood is zoned as residential. Under these facts we do not think the city council acted arbitrarily or unreasonably in the passing of this ordinance. We find that in so doing it properly exercised the police powers granted to it, and that the ordinance is valid and should be enforced. In view thereof, we find the decree of the trial court to be correct and the same is therefore affirmed.

Affirmed.

CARTER, J., dissenting:

I am not in accord with the decision of the majority. A zoning law or ordinance is a direct infringement or limitation upon vested property rights. As such they must be

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reasonable in their application and not constitute arbitrary and capricious legislation.

The property involved in the present case lies outside of the city of Omaha. It is a part of a tract used primarily as a golf course and it is reasonable to anticipate that it will be so used for at least another 18 years since it is under lease for that purpose for that period of time. It lies adjacent to a state highway carrying a heavy volume of traffic, commercial and otherwise. The evidence does not show that there are any residences on this or adjoining tracts within 700 feet of appellant's property.

Under such circumstances I find no justification or reason for zoning the tract as first residence property. The zoning of such property as first residence property is arbitrary and capricious, and has the effect of a condemnation of the property without compensating the owner therefor. It was never contemplated that such an arbitrary interference with the right to use property should be permitted under the guise of zoning for the public good of a municipality. In my opinion the ordinance unreasonably interferes with the property rights of the appellant and is void insofar as it applies to the property in question. This court should so hold.

YEAGER and BOSLAUGH, JJ., concur in this dissent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 792

HENRY C. GLISSMANN,

Appellant,

vs.

THE CITY OF OMAHA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDWARD F. FOGARTY,
EDWARD SKLENICKA,
JAMES M. PAXSON,
HERBERT FITLE,
Counsel for Appellee, City of Omaha;
ALFRED G. ELLICK,
Counsel for Intervening-Appellees.

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IN THE SUPREME COURT OF NEBRASKA

General No. 32640

THE CITY OF OMAHA, A MUNICIPAL CORPORATION,
Appellee;

NINETIETH STREET REALTY COMPANY, A CORPORATION, AND WEST HILLS IMPROVEMENT CLUB, A CORPORATION,
Interveners-Appellees,

vs.

HENRY C. GLISSMANN,
Appellant

STATEMENT OPPOSING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Motion to Dismiss or Affirm

This Statement and Motion is filed pursuant to Rule 12, Section 3, of the Rules of the Supreme Court of the United States which permits the appellee, within 15 days after the service prescribed by Section 2 of Rule 12, to file a typewritten statement disclosing any matter or ground making against the jurisdiction of the Supreme Court asserted by the appellant and to include therein a motion to dismiss or affirm.

Statement of Facts

On December 30, 1947, the city council of the City of Omaha, Nebraska, duly enacted and passed Ordinance No. 15833 which amended the regular zone ordinance of said

City by changing from the 2nd Suburban District to the 1st Residential District three large tracts of land, totaling over 500 acres, located west of the city limits. A copy of Ordinance No. 15833 is attached hereto and marked Exhibit A. The appellant, Henry C. Glissmann, was at that time a leasee under a 20 year lease of a part of the lands changed by the new ordinance. His leased ground was used principally for a golf course, but about 14 acres were vacant. It is upon these 14 acres that he desires to operate a trailer camp. The evidence is undisputed that trailer camps were permitted in this area prior to the passage of Ordinance No. 15833 but were prohibited thereafter.

Shortly after the passage of Ordinance No. 15833 the appellant proceeded to construct a trailer camp on a part of the 14 acre tract. On April 13, 1948, the City of Omaha commenced a suit in the District Court of Douglas County, Nebraska, to enjoin such construction on the ground that the appellant was violating the zone ordinance of the City, as amended by Ordinance No. 15833. Immediately thereafter the West Hills Improvement Club, a corporation, and the Ninetieth Street Realty Company, a corporation, being property owners in the vicinity of the proposed trailer camp, intervened on behalf of the City. In his answer appellant asserted that he had a right to proceed with the construction of his trailer camp for the reason that he had a "vested right" or non-conforming use because (1) trailer parks were permitted when he entered into his lease and (2) he had conceived the idea of a trailer park and had expended some money for plans and materials before Ordinance No. 15833 was adopted. This issue was stated by the appellant in his answer as follows:

> "This answering defendant admits that he intends to go ahead with the construction, maintenance and operation of said trailer park for the reason that said ordinance is not retroactive, and does not apply

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> to the property leased by him, for the reason that he had a vested right to erect, construct and maintain a trailer park as authorized by the Ordinance, when he entered into the lease, and for the City Council to attempt, after he acquired said vested right to deprive him of the right to operate, construct and maintain said trailer park, would be in violation of the Constitution of the State of Nebraska and of the United States, prohibiting the state or any political subdivision thereof from depriving him of his property, without just compensation and would be unconstitutional."

The case went to trial (no jury) on these pleadings. At the close of the *City's* case the appellant asked and received permission from the trial court to amend his answer by adding the following clause to paragraph 7 thereof:

> "That said amended ordinance is in violation of the defendant's rights in that it has no relation to the police power of the City, nor public safety, nor public morals, and is therefore unconstitutional as depriving this defendant of his property without just compensation."

On January 26, 1949, the trial court entered a decree in favor of the City and against the defendant, finding that the zone ordinance did not deprive the defendant of any vested rights and was not unconstitutional. The decree enjoined the defendant from constructing or operating a trailer camp. The appellant then posted a supersedeas bond and appealed to the Supreme Court of Nebraska. On December 6, 1949, that court affirmed the decision of the court below. Appellant's motion for a rehearing was overruled on February 4, 1950.

The Supreme Court of Nebraska in its opinion (151 Neb. 895, 39 N. W. 2d 828) considered two main problems. First, whether under the facts of the case and the laws of Nebraska defendant (appellant) had a vested right or nonconforming

use because he had leased the ground and conceived the idea of building a trailer camp prior to the adoption of Ordinance No. 15833. The court stated this issue as follows:

> "Appellant's primary contention is that under these facts and circumstances he had established a nonconforming use of these premises as a trailer camp or park prior to the amendment by the city of its zoning ordinances relating thereto and that such right, being vested, the city could not deprive him thereof."

The court answered this contention in this manner:

> "We have come to the conclusion that if, after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change. See Trans-Oceanic Oil Corp. v. City of Santa Barbara, supra.
>
> "We find appellant's contention in this respect is not well taken for under the facts and circumstances of this case, as hereinbefore fully set out, the appellant had not established any vested right to use these premises for the purpose here contended when the change was made. Consequently, we find that the ordinance passed on December 30, 1948, which eliminated the use of the premises for that purpose, lawfully extinguished his permit and any rights he may have had thereunder."

The second question involved the constitutionality of Ordinance No. 15833. The court first announced the rule that an ordinance passed by a city in the exercise of its police power is presumably valid and the courts will not interfere with its enforcement until the reasonableness or

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want of necessity of such measure is made to appear by satisfactory evidence. The court then concluded:

> "The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts presented in each particular case. The evidence here shows, with reference to the tracts herein involved, that the commercial development along Dodge Road is a considerable distance to the south and east; that the immediate area to the east, southeast, and south is the golf course operated by the appellant; that to the southwest, west, northwest, and northeast are residential areas and to the north are some gardens. There appears to be no commercial development in this immediate area. In fact, the entire neighborhood is zoned as residential. Under these facts we do not think the city council acted arbitrarily or unreasonably in the passing of this ordinance. We find that in so doing it properly exercised the police powers granted to it, and that the ordinance is valid and should be enforced. In view thereof, we find the decree of the trial court to be correct and the same is therefore affirmed."

Three justices dissented on the ground that "the ordinance unreasonably interferes with the property rights of the appellant and is void insofar as it applies to the property in question." It is to be noted, however, that the dissenting justices did not designate which Constitution (*i. e.*, federal or state) they believed was violated.

On March 24, 1950, an Order Allowing Appeal was signed by the Chief Justice of the Supreme Court of Nebraska and on March 28, 1950, the appellees were served with certain papers purporting to be those required by Rule 12, Section 2.

Under these facts appellees contend that the appeal should be dismissed for the reasons that (1) the record does not present for decision any substantial federal ques-

tion, and (2) the jurisdictional statement filed by the appellant does not meet the requirements of Rule 12, Section 1, of the Rules of the Supreme Court.

Argument

I

Appellees contend that the record of this case does not present for decision any substantial federal question and that, therefore, the appeal should either be dismissed or the decision of the state court affirmed. Rule 12 was promulgated by the Supreme Court to safeguard itself against inroads upon its time caused by a multitude of trivial and farfetched claims of denial of due process or other constitutional right. As we understand it, the proof of jurisdiction must establish not only that the case is one falling within the strict terms of Sec. 1257 of the Judicial Code but also that the question which it presents is a federal question of substance neither frivolous nor already settled.

In the present case it must be remembered that we are concerned with the enforcemnt of a city ordinance duly adopted and passed by the city council of the City of Omaha. This ordinance amended the former zone ordinance by changing the use to which a wide area west of the city limits could be put. The appellant wants to build a trailer camp in a part of this area and the amended zone ordinance requires that the property be used for residential purposes. Not a single witness was brought forth by the appellant to testify that his leased land could not be used for residential purposes. The owner of the land, from whom the appellant leases, is not a party to the suit and at no time has opposed the amended zone ordinance.

Thus, we are here concerned not with the validity of a state statute, but with the validity of a local municipal ordinance which both the trial court and the state supreme

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court have declared is valid and enforceable. True, the Supreme Court of the United States has declared that the word "statute" in the Judicial Code is used in a broad sense and includes a municipal ordinance, yet we submit that the interpretation of a local ordinance is not as important or substantial as the interpretation of a state statute. The very evil which Rule 12 was intended to prevent will certainly come to pass if every litigant who dislikes a local ordinance can take his case to the Supreme Court of the United States simply by alleging in general terms that the ordinance is unconstitutional.

As we have explained in the statement of facts, the appellant in his answer as first filed simply alleged that he had a nonconforming use and that, therefore, he could go ahead with his trailer camp even though the ordinance was valid. In other words, he contended that the ordinance could not operate retroactively. During the trial of the case, and after the plaintiff City had rested, the appellant amended his answer to allege that the ordinance was "unconstitutional as depriving this defendant of his property without just compensation." The trial court dismissed this contention with a single sentence (Transcript, page 43), and went on to consider the primary question of nonconforming use. This latter issue is purely one of state law—this is, it concerns the construction of the ordinance from the standpoint of whether or not it operates retroactively and what constitutes a nonconforming use. The trial court decided that the appellant did not have a nonconforming use for the reason that he had neither started construction of the trailer camp nor had he expended any substantial sum of money prior to the adoption of the new zone ordinance.

The Supreme Court of Nebraska considered the same two issues. It first discussed what it described as "appellant's primary contention" and ruled that appellant had not gained a nonconforming use. The Court then went on

to discuss the issue of constitutionality. It disposed of this by saying, in essence, that there was no evidence of unreasonableness and that, therefore, the ordinance was valid, since under Nebraska law an ordinance passed in the exercise of a city's police power is presumably valid unless the unreasonableness is shown by satisfactory evidence. No federal cases were cited.

The rule is well established that under its police power a municipality may enact reasonable regulations governing the use to which real property may be put. It is this rule which is the foundation of the zoning system of the modern American municipality. The Supreme Court of the United States long ago upheld the broad principle that such exercise of the police power is valid under the federal constitution. The leading case on this point is *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114. The only problem that remains, therefore, is whether under the particular facts and circumstances of each case the zoning ordinance being challenged is fair and reasonable. Appellees submit that this is primarily a question of fact, and that in the present case the Supreme Court of Nebraska has resolved this fact question in favor of the validity of the ordinance. The rule has often been stated that ordinarily a state court's findings of fact and its rulings on discretionary matters are conclusive on the Supreme Court.

Thus we have a situation where the appellant claims a right of review simply because he has made a general claim of unconstitutionality. Appellees submit that this asserted right is so wanting in foundation and is so unsubstantial as to be devoid of all merit and frivolous. In *Zucht* v. *King*, 43 S. Ct. 24, 260 U. S. 174, 67 L. Ed. 194, the Supreme Court said:

> "But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question

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presented is not, and was not, at the time of granting the writ, substantial in character. Sugarman v. United States, 249 U. S. 182, 184, 63 L. Ed. 550, 551, 39 Sup. Ct. Rep. 191. * * *"

II

The appellees further submit that the appeal should be dismissed because the jurisdictional statement filed by the appellant does not meet the requirements of Rule 12, Section 1, of the Supreme Court Rules in the following respects:

(a) The jurisdictional statement not only does not "refer distinctly," but does not refer at all, "to the statutory provision believed to sustain the jurisdiction."

(b) The jurisdictional statement does not set out verbatim or appropriately summarize the pertinent provisions of the statute of the state (in this case a municipal ordinance) the validity of which is involved.

(c) The jurisdictional statement not only does not "refer distinctly", but does not refer at all, "to the date of judgment or decree sought to be reviewed and the date upon which the application for appeal is presented."

(d) The jurisdictional statement does not contain quotations from the record or references to the places in the record where the matter appears "as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on" the Supreme Court of the United States.

(e) The applicant did not append to the jurisdictional statement a copy of the opinion rendered by the Supreme Court of Nebraska, reference to which is necessary to ascertain the grounds of the judgment or decree.

(f) The appellant has cited no cases to sustain the appellate jurisdiction of the Court.

WHEREFORE, the appellees move to dismiss the appeal of the appellant herein on the ground that the case presents no substantial federal question and on the further ground that the jurisdictional statement filed by the appellant does not meet the requirements of Rule 12, Section 1, and the appellees further move, if the motion to dismiss is not granted, that the decision of the Nebraska Supreme Court be affirmed on the ground that the federal questions, if any, upon which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in the foregoing Statement Opposing Jurisdiction filed herewith.

Respectfully submitted,

THE CITY OF OMAHA, a Municipal Corporation,

Appellee

By EDWARD F. FOGARTY,
EDWARD SKLENICKA,
JAMES M. PAXSON,
HERBERT FITLE,
Per EDWARD F. FOGARTY,

One of its Attorneys.

WEST HILLS IMPROVEMENT CLUB, a Corporation, and
NINETIETH STREET REALTY COMPANY, a Corporation,

Interveners-Appellees.

By SPIER & ELLICK,
ALFRED G. ELLICK,

Their Attorneys,
712 Farm Credit Building,
Omaha 2, Nebraska

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EXHIBIT "A"

ORDINANCE No. 15833

AN ORDINANCE TO AMEND ORDINANCE No. 15239 OF THE CITY OF OMAHA BY CHANGING THE BOUNDARIES OF THE DISTRICT MAP; AND REPEALING THAT PART OF ORDINANCE No. 15239 OF THE CITY OF OMAHA IN CONFLICT HEREWITH.

Be It Ordained by the City Council of the City of Omaha:

Section 1. That the District Map which is a part of Ordinance No. 15239 of the City of Omaha, be, and the same is hereby, changed and amended so that the area between Pacific Street on the south and Dodge Road on the north from 84th Street to 90th Street; the area between Pacific Street on the south and Dodge Road or Cass Street on the north of 93rd Street to 96th Street; and the area between Dodge Road or Cass Street on the south to Western Avenue, extended, on the north from 90th Street to 96th Street, be rezoned from 2nd Suburban District to the 1st Residence District.

Also, that area bounded by Dodge Road or Cass Street on the south and Western Avenue on the north and from 87th Street on the east to that tract now zoned 1st Residence District on the west, be rezoned from 2nd Suburban District to the 2nd Residence District.

Section 2. That all parts of Ordinance No. 15239 of the City of Omaha in conflict herewith be, and the same are hereby, repealed.

Section 3. That this ordinance shall take effect and be in force from and after fifteen days after its passage.

(S.) CHARLES W. LEEMAN,
Mayor and President of City Council.

Passed: Dec. 30, 1947. Attest:

(S.) M. J. DINEEN, JR.,
City Clerk.

Introduced By:
(S.) CARL W. JENSEN.

Approved As To Form:
(S.) EDWARD SKLENICKA,
City Solicitor.

No. 792. GLISSMANN *v.* CITY OF OMAHA ET AL. Appeal from the Supreme Court of Nebraska. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *S. L. Winters* for appellant. *Alfred G. Ellick* for appellees. Reported below: 151 Neb. 895, 39 N. W. 2d 828.

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